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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 491

EDWARD J. GAY PLANTING & MANUFACTURING CO., LTD.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND SUPPORTING BRIEF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Edward J. Gay Planting & Manufacturing Co., Ltd., a Louisiana corporation, respectfully prays that a writ of certiorari issue to review the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the foregoing cause (Docket Number 10965). That Court's opinion was rendered on June 23, 1944 and is reported in 143 Fed. 2d 452.

JURISDICTION.

Jurisdiction is conferred upon the Supreme Court to review this cause by writ of certiorari by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A., Title 28, Section 347), and by the Rev-

enue Act of 1936, Title VII, Section 906(g) as amended by Section 510(j) of the Revenue Act of 1942 (56 Stat. 969) printed in the Appendix hereto.

SUMMARY STATEMENT OF MATTERS INVOLVED.

Edward J. Gay Planting & Manufacturing Co., Ltd., herein for convenience called Gay, was a grower and processor of sugarcane, and during the period from June 8, 1934, through November 30, 1935, paid processing taxes totaling $27,419.30 under the Agricultural Adjustment Act of 1933 as amended. It filed a claim for refund of these taxes pursuant to Title VII of the Revenue Act of 1936. The Commissioner of Internal Revenue having disallowed this claim, petition was filed thereon with the United States Processing Tax Board of Review.

That Board heard the cause. The entire evidence consisted of a stipulation. Thereafter, and before the Board decided the cause, jurisdiction was transferred to the Tax Court of the United States by Section 510 of the Revenue Act of 1942.

The Tax Court found the facts as stipulated by the parties (R. 35) and decided that Gay was not entitled to a refund of any portion of the processing tax paid.

Gay appealed to the Circuit Court of Appeals and limited its prayer to a judgment based on the margin computation provided by statute.

The refund of processing taxes paid under the Agricultural Adjustment Act as amended—which was invalidated by this Court in *U. S.* v. *Butler* (297 U. S. 1) on January 6, 1936—is controlled by Title VII of the Revenue Act of 1936 set forth in the Appendix hereto. The statute provides in Section 907 for a margin computation. The result of that margin computation establishes a prima facie presumption of the tax burden borne or shifted, although the party adversely affected can rebut such margin presumption by evidence of the actual extent to which the tax burden was borne or shifted.

In the instant case, the margin computation was not rebutted and the sole issue before the Circuit Court was the determination of the margin. If the margin was computed by using the actual cost of the commodity processed pursuant to Section 907 (b)(5)(a) it created a presumption in favor of Gay to the extent of a tax burden borne of $16,078.95—if the margin was computed by using the current market value of the commodity processed at the time of processing pursuant to Section 907 (b)(5)(b) the presumption created was that Gay bore none of the tax burden.

The Circuit Court had theretofore held in *Commissioner* v. *Bain Peanut Co.* (134 F. (2d) 853) that actual cost is exclusive if available. The stipulation, comprising the entire evidence, set forth the facts and figures necessary to determine the margin on either premise, and Gay relying on *Commissioner* v. *Bain Peanut Co.* (*supra*) contended that actual cost should be used in determining the margin presumption.

The Circuit Court agreed that actual cost if available should be used; but, by—on its own volition—going beyond the plain words of paragraph 11 of the stipulation and placing its own construction thereon held that cost had not been established. Hence from Gay's viewpoint this is the:

QUESTION PRESENTED.

Can the Court disregard the judicial admission made by Counsel in a Stipulation and hold from other unrelated parts of the said Stipulation that the fact is unproven?

REASONS FOR GRANTING THE WRIT.

Here Counsel presented but one question to the Court below, that is whether in computing margins actual cost of commodity is controlling, or whether, in the alternative, current market prices at the time of processing could be substituted. All the facts were stipulated. The Stipulation constituted the entire evidence. At the time the Stipulation was filed with the trial court the question was un-

decided. Both parties had determined to stand or fall on the prima facie presumption—nothing remained but to have a Court determine the manner of computing the margin presumption. Subsequent to the Gay trial the Fifth Circuit did decide the question in *Commissioner* v. *Bain Peanut Co.* (*supra*) and it appeared as though the Fifth Circuit would give judgment for Gay.

Counsel for the Respondent in his brief and argument attempted to vary the plain words of the stipulation by linking to the pertinent paragraph other paragraphs entirely unrelated to the question of actual cost; and, proposed that if the Court disagreed, that the cause be remanded.

The Circuit Court accepted respondent's argument and disregarded the part of the stipulation that stipulated actual cost (par. 11, R. 51) deciding that it stood upon its previous decision in *Commissioner* v. *Bain* (*supra*) but that here Gay had not given the Court a cost to apply.

By so holding, and accepting the argument of Counsel for Respondent, the Court destroyed the conclusive nature of judicial admissions, and if permitted to stand, will destroy all judicial procedure and the administration of justice, by making worthless all stipulations that cover more than one fact.

The Circuit Court has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

CONCLUSION.

Wherefore, it is respectfully requested that a writ of certiorari issue.

C. J. Batter,
902 American Security Building,
Washington, D. C.,
Counsel for Petitioner.

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v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

BRIEF IN SUPPORT OF PETITION.

SPECIFICATIONS OF ERROR TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that Gay failed to establish the actual cost of the commodity processed.

2. In modifying the plain and unambiguous language of paragraph 11 of the stipulation by combining it with paragraphs 7 and 9 of the stipulation; whereas, in fact each paragraph stands alone.

3. In holding that the margin should be computed by using the current market value of the commodity at the time of processing (Sec. 907 (b)(5)(b); instead of by using the actual cost of the commodity processed (Sec. 907 (b)(5)(a).

ARGUMENT.

Analysis of the Stipulation.

The stipulation appearing on pages 48 through 53 of the record contains eighteen (18) paragraphs. Each paragraph contains a certain set of facts, complete in itself; and, not in conflict with facts contained in other paragraphs. An analysis of the various paragraphs discloses:

Paragraph 1. That Gay was subject to the tax; paid the tax; filed a refund claim which was denied; and filed a petition with the United States Processing Tax Board of Review.

Paragraph 2. Describes the contents of the claim for refund.

Paragraph 3. States the duration of the tax period.

Paragraph 4. Sets forth the type of sugar produced and the marketing conditions.

Paragraph 5. Determines the Gross Sales Value for margin computation purposes.

Paragraph 6. States the number of units processed in each period.

Paragraph 7. Describes the accounting procedure of Gay and reads:

> "That the petitioner processed sugar cane which it grew on its own plantation and sugar cane which it purchased in the open market from other planters; that the books and records of the petitioner were departmentalized, segregating its agricultural operations (the production of sugar cane) from its factory operations (the conversion of own-grown cane and purchased cane into sugar products); that cane purchased from other planters was charged to its factory operations at the actual cost of such purchases delivered to the factory; that the actual cost of cane purchased by petitioner was the same as the current market price at time of processing of cane of like grade and quality

in the markets where the petitioner customarily made its purchases; that cane grown on its own plantation was charged to its factory operations at the current market price of sugar cane of like quality and grade; and that such charges, appearing in the factory operations of the petitioner, were used by the petitioner as the cost of commodity processed during the respective periods in its claim for refund as filed."

Paragraph 8. Stipulates the cost of the commodity for the several periods pursuant to Section 907 (b)(5)(b) of the Revenue Act of 1936.

Paragraph 9. Describes the crop season and Gay's farm accounting procedure. It reads:

"That sugar cane grown on the Petitioner's plantation is planted during September and October and is harvested during the months of October to December, inclusive, of the following year; that, in addition to the crop which is harvested thirteen or fourteen months after planting, there are second and third cuttings in subsequent years from that same planting; and that all costs incidental to the planting and cultivation of the crop are charged against the first harvest, no costs being deferred as applicable to the second and third cuttings."

Paragraph 10. Describes the benefit payments received under the Agricultural Adjustment Act.

Paragraph 11. Stipulates the actual cost of the commodity processed for the several periods on the basis of including and excluding benefit payments, pursuant to Section 907 (b)(5)(a) of the Revenue Act of 1936; and reads:

"That the petitioner's cost of commodity processed, using the cost of growing cane as reflected by the portion of its books and records dealing with agricultural operations plus the actual cost of cane purchased by petitioner from other planters, was $167,969.33 during the tax period and $248,096.04 during the period before and after the tax; that the benefit payments received by the petitioner from the Secretary of Agriculture

were treated as income on that portion of its books and records dealing with agricultural operations; and that, should such payments be held to serve as a reduction of the cost of growing cane, the petitioner's cost of commodity processed was $115,890.47 during the tax period and $248,096.04 during the period before and after the tax."

Paragraph 12. Stipulates the increase in cost of processing.

Paragraph 13. Establishes the final disposition date of the processed sugar.

Paragraph 14. Stipulates the billing of tax on molasses and the taxpayer's practice following the invalidation of the tax.

Paragraph 15. Stipulates that the Secretary of Agriculture made no payments under Section 8, Par. 7 of the Agricultural Adjustment Act as amended.

Paragraph 16. Provides that there is no agreement or understanding whereby Gay may be relieved of the tax.

Paragraph 17. Determines that Gay sold its sugar with a guarantee against price decline.

Paragraph 18. Stipulates that Gay did no processing during the period February 1 to July 31, 1936.

The paragraphs of the stipulation are numbered—each covers a set of related facts. No paragraph is dependent upon another to determine a fact. The issue was clearly presented to the Court. If the Fifth Circuit held—as it later did in *Commissioner* v. *Bain Peanut Co.* (*supra*)—that actual cost if determinable from the books was exclusive Gay was expected to recover under paragraph 11. If the Circuit Court had held that the bookkeeping method described in paragraph 7 was controlling, then Gay could not recover.

Paragraph 11 was drawn to meet the requirements of Section 907 (b)(5)(a), that is, the cost was reflected in the

accounting procedure. That must be obvious. Otherwise the paragraph served no purpose because the other cost permitted by statute was already stipulated in paragraph 8.

It is clear that the Court erred in holding that the taxpayer has failed to establish cost pursuant to Section 907 (b)(5)(a).

Effect of the Stipulation.

"An express waiver, made in court or preparatory to trial, by the party or his attorney, conceding for the purposes of the trial the truth of some alleged fact, has the affect of a confessatory pleading, in that the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it, and the other is not allowed to disprove it. This is what is commonly termed a solemn—i.e. ceremonial or formal—or *judicial admission, or stipulation.* It is, in truth, a substitute for evidence, in that it does away with the need for evidence." *Wigmore* on Evidence (Third Edition, Section 2588 and authorities cited therein).

The Court below by linking paragraphs 7 and 9 to paragraph 11 substituted a state of facts not encompassed in the stipulation. Unless counsel can rely upon the court's acceptance of a stipulation as stipulated, one of the greatest keystones of our jurisprudence is in jeopardy.

"The vital feature of a judicial admission is universally conceded to be its *conclusiveness* upon the party making it, i.e., the prohibition of any further dispute of the fact by him, and of any use of evidence to disprove or contradict it." *Wigmore* on Evidence (Third Edition, Section 2590 and authorities cited therein).

Not only may the party adversely affected offer no evidence to dispute it, but the party benefiting may be precluded from offering testimony, because it is now immaterial, may encumber the record, and he may not be entitled to the dramatic force which might be gained from an examination of the witness. *Wigmore* on Evidence (Third Edition, Section 2591).

With Counsel so strongly bound by a stipulation—even one made by an adversary to soften the impact of damaging testimony—how can a court go beyond the fact and create a new set of facts by linking several stipulated but unrelated facts? If Counsel for the parties had intended—or desired—to associate the paragraphs, they could have done so by reference. The Court cannot do for Counsel what Counsel has failed to do for himself. To permit such a practice places opposing counsel in the position of being unable to adduce opposing testimony because the trial has terminated.

CONCLUSION.

For the reasons stated in the foregoing petition and supporting brief, it is respectfully submitted that this petition for writ of certiorari should be granted.

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Counsel for Petitioner.

APPENDIX.

Revenue Act of 1936, 49 Stat. 1747:

TITLE VII—REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT.

Sec. 902. CONDITIONS ON ALLOWANCE OF REFUND.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

* * * * * * * * * *

Sec. 906. PROCEDURE ON CLAIMS FOR REFUND OF PROCESSING TAXES. (49 Stat. 1750)

* * * * * * * * * *

(g) A review of the decision of the Board, made after the hearing provided in this section, may be obtained by the claimant or Commissioner by filing a petition for review in the Circuit Court of Appeals of the United States within any circuit wherein such claimant resides, or has his principal place of business, or, if none, in the United States Court of Appeals for the District of Columbia, or any such court which may be designated by the Commissioner and the claimant by stipulation in writing, within three months after the date of the mailing to the claimant and the Commissioner of the copy of the findings and decision of the Board. A copy of such petition shall forthwith be served upon the Commissioner or upon any officer designated by him for that purpose, or upon the claimant, according to which party files such petition, and upon the Board. Thereupon the Board shall certify and file in the court in which such petition has been filed, a transcript of the record upon which the findings and decision complained of were based. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without remanding the cause for a rehearing, as justice may require. No objection shall be considered by the court unless such objection shall have been urged before the Board or division and the presiding officer, or unless there were reasonable grounds for failure so to do. If the claimant or the Commissioner shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for failure to adduce such evidence in the hearing before the presiding officer, the court may order such additional evidence to be taken before such officer, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings of fact and decision by reason of the additional evidence so taken and it shall file with the court such modified or new findings and decision. The judgment of the court shall be final, subject to review by the Supreme Court of the United States, upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code, as amended. Such courts are authorized to adopt rules for the filing of petitions for review, the preparation of the record for review, and the conduct of the

proceedings on review. If the decision of the Board is affirmed, costs shall be awarded against the claimant, and if such decision is reversed, the judgment shall provide for a refund of any costs paid by the claimant. In case of modification of such decision costs shall be awarded or refused as justice may require. The decision of the Board made after the hearing provided herein shall become final in the same manner that decisions of the Board of Tax Appeals become final under section 1005 of the Revenue Act of 1926, as amended.

SEC. 907. EVIDENCE AND PRESUMPTIONS. (49 Stat. 1751)

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(2) *Period before and after the tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows:

From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of commodities.*—Where, as, for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross sales value of articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from

the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others.

Section 510 Revenue Act of 1942 (56 Stat. 969).

* * * * * * * * * *

(j) Section 906 (g) (relating to appeals) is amended to read as follows:

"(g) A decision of the Board rendered after January 1, 1943, may be reviewed by a circuit court of appeals or the United States Court of Appeals for the District of Columbia, if a petition for such review is filed by either the claimant or the Commissioner within three months after the decision is rendered. Such decision may be reviewed by the circuit court of appeals for the circuit in which the claimant resides, or has his principal place of business, or, if none, by the United States Court of Appeals for the District of Columbia: *Provided, however,* that in any event such decision may be reviewed by any circuit court of appeals or the United States Court of Appeals for the District of Columbia which may be designated by the Commissioner and the claimant by stipulation in writing. Such courts shall have exclusive jurisdiction to affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without demanding the cause for a rehearing as justice may require. The judgments of such courts shall be final, subject to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code as amended. Such courts are authorized to adopt rules for the filing of petitions for review, preparation of the record for review, and the conduct of the proceedings on review. A decision of the Board rendered after January 1, 1943 shall become final in the same manner that decisions of the Board become final under section 1140 of the Internal Revenue Code."

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Statute:

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In the Supreme Court of the United States

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No. 491

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v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Tax Court entered memorandum findings of fact and an opinion which are not reported but appear at R. 35–40. The opinion of the Circuit Court of Appeals (R. 57–59) is reported at 143 F. 2d 452.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 23, 1944 (R. 60). The petition for a writ of certiorari was filed on September 22, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the taxpayer failed to establish that it bore the burden of any part of the processing tax paid by it, as required by Section 902 of the Revenue Act of 1936 in order to secure a refund.

STATUTE INVOLVED

The pertinent statute is set forth in the Appendix, *infra,* pp. 10–16.

STATEMENT

This proceeding was instituted in the Processing Tax Board of Review [1] upon the disallowance by the Commissioner of the taxpayer's claim, filed under Title VII of the Revenue Act of 1936, for the refund of processing taxes paid under the provisions of the Agricultural Adjustment Act, c. 25, 48 Stat. 31, in the amount of $27,419.30 (R. 4–9).

The parties filed a joint stipulation of facts before the Processing Tax Board (R. 48–53). The case was submitted to the Tax Court on the stipulation, which was the only evidence presented, and on the record otherwise made before the Processing Tax Board (R. 3). The Tax Court made its findings of fact on the basis of the stipulation, and held that the taxpayer had failed to prove that it was entitled to a refund of any part of the amount involved (R. 35–40).

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[1] The Processing Tax Board of Review was abolished, effective as of the close of business on December 31, 1942, and its jurisdiction transferred to the Tax Court of the United States, by Section 510 of the Revenue Act of 1942, c. 619, 56 Stat. 798.

So far as they are here pertinent, the facts so stipulated and found are as follows (R. 35–38):

The taxpayer was a grower of sugar cane, a purchaser of sugar cane, and a producer of direct consumption sugar. It paid processing taxes in the sum of $27,419.30 on the processing of sugar cane pursuant to the Agricultural Adjustment Act, as amended. It filed a timely claim, under Title VII of the Revenue Act of 1936, for the refund of the entire amount of processing taxes paid, which claim was disallowed in full by the Commissioner of Internal Revenue. The taxpayer filed a petition for review with the United States Processing Tax Board of Review. (R. 35–36.)

This claim for refund, as filed and as disallowed by the Commissioner, disclosed a tax period margin of $0.01626685 per unit of commodity processed and a margin for the period before and after the tax of $0.00939057 per unit of commodity processed, or an excess margin during the tax period of $0.00687628 per unit (R. 36). The tax period of the taxpayer was the period commencing June 8, 1934, and ending November 30, 1935 (R. 38).

The taxpayer produced plantation granulated sugar and first molasses for direct consumption by the sulphitation process. It also produced blackstrap molasses, as a byproduct. (R. 36.) The taxpayer processed sugar cane which it grew on its own plantation and sugar cane which it pur-

chased in the open market from other planters. The books and records of the taxpayer were departmentalized, segregating its agricultural operations (the production of sugar cane) from its factory operations (the conversion of own-grown cane and purchased cane into sugar products). Cane purchased from other planters was charged to its factory operations at the actual cost of such purchases delivered to the factory, which was the same as the current market price at the time of processing of cane of like grade and quality in the markets where the taxpayer customarily made its purchases. The cane grown on its own plantation by the taxpayer was charged to its factory operations at the current market price of sugar cane of like quality and grade. The taxpayer used such charges as entered upon its books for its factory operations in computing the cost of commodity processed during the respective periods in its claim for refund filed as hereinbefore set out. (R. 36–37.)

The sugar cane grown on the taxpayer's plantation is planted during September and October and is harvested during the months of October to December, inclusive, of the following year. In addition to the crop which is harvested 13 or 14 months after planting, there are second and third cuttings in subsequent years from that same planting. Under the taxpayer's method of accounting, all costs incident to the planting and cultivation

of the crop are charged against the first harvest, no costs being deferred as applicable to the second and third cuttings. (R. 37.)

The taxpayer at all times sold its granulated sugar at a fixed differential of 35¢ under the prices of the large sugar refiners, all of whom increased their prices by 55¢ per 100 pounds of refined sugar on June 8, 1934, the effective date of the imposition of the processing tax on sugar at the rate of 53½¢ per 100 pounds (R. 36).

The taxpayer billed the processing tax as a separate item on all its invoices covering the sale of tax-paid molasses, the amount of tax so billed being $3,814.90. Two of the taxpayer's customers, in settling for some 57,000 pounds of refined sugar invoiced to them during the month of December 1935, which was sugar on which the taxpayer paid no processing tax, deducted the amount of the tax from the invoice price, and such deductions were allowed by the taxpayer. (R. 37.) After the invalidation of the Agricultural Adjustment Act on January 6, 1936, by the decision of the Supreme Court in *United States* v. *Butler,* 297 U. S. 1, the taxpayer's sales invoices carried one or the other of the following notations (R. 37):

> (a) Buyer to pay processing tax, if any.
>
> (b) Excise, or any other tax applicable to this sugar, for account of the buyer.

The Circuit Court of Appeals held (R. 57–59), as had the Tax Court (R. 38 39), that the tax period margin and the margin for the period before and after the tax, as above stated (p. 3), were properly computed by the taxpayer, and since the margin during the tax period exceeded the margin during the before and after periods, that the taxpayer must be presumed, under Section 907 (a) of the Revenue Act of 1936, to have borne none of the processing tax but to have shifted it to others. The record contains other evidence which, as the Tax Court held (R. 39–40), affirmatively establishes, independently of the statutory presumption, that the burden of the tax was passed on to others, and it contains no evidence to rebut the presumption. The Circuit Court of Appeals affirmed, holding that the Tax Court's decision is supported by substantial evidence (R. 59).

ARGUMENT

If the margin as computed in accordance with Section 907 (b) of the Revenue Act of 1936 (Appendix, *infra,* pp. 11–13) was higher in the tax period than in the periods before and after, that fact is "prima facie evidence" under Section 907 (a) that the processing tax was not borne by the taxpayer, and unless the record shows evidence that the processing tax was borne by the taxpayer, as here it does not, the taxpayer may not recover

a refund of the processing tax paid. The margin found by the Tax Court and relied upon by the Circuit Court of Appeals was higher in the tax period than in the periods before and after. This margin was computed under Section 907 (b) (5) by using the current market price of the sugar-cane processed, although as the parties here agree and the Tax Court and the court below recognized (R. 38–39, 59), actual cost should be used, as prescribed in Section 907 (b) (5) (a), if the actual cost is available and the accounting procedure of the taxpayer is based thereon. *Commissioner* v. *Bain Peanut Co.*, 134 F. 2d 853 (C. C. A. 5), rehearing denied, 134 F. 2d 858, certiorari granted, 320 U. S. 721, dismissed, 321 U. S. 800.

The taxpayer's sole complaint here (Pet. 3–4) is that the Tax Oourt and the court below refused to accept the plain words of paragraph 11 of the stipulation, which states the cost of commodity processed, "using the cost of growing cane as reflected by the portion of [the taxpayer's] * * * books and records dealing with agricultural operations plus the actual cost of cane purchased * * *" (R. 51). But here the cost of growing cane as reflected by the portions of the books and records dealing with agricultural operations is not the actual cost, for, as stipulated in paragraph 9, sugar cane planted on the taxpayer's plantation in September and October of one year

is harvested in three successive cuttings, one in each succeeding year, and all costs incidental to planting and cultivation of the crop are charged against the first harvest, no costs being deferred as applicable to the second and third cuttings (R. 51). The cost computed under this procedure bears no relation to "actual cost" (sec. 907 (b) (5) (a)) unless it is assumed that during the seven years which such a procedure would affect, there was perfect constancy in all factors such as the cost and extent of planting, and the rate of yield therefrom—a theoretical assumption in no way borne out by proof and indeed contrary to common experience.

In thus rejecting the cost stipulated in paragraph 11 on the ground that it does not represent "actual cost," and using instead the current market price (sec. 907 (b) (5) (b)), as in fact the taxpayer itself did in its claim for refund and in the portion of its bookkeeping devoted to its factory operations (R. 48, par. 2; R. 50, par. 7), the courts below plainly did not destroy the conclusive nature of judicial admissions (Pet. 4) but gave full effect to the facts stipulated.

Moreover, although it was unnecessary for the Circuit Court of Appeals to pass on the question, the Tax Court found that other evidence, independent of the presumption, affirmatively established that the burden of the tax was not absorbed by the taxpayer (R. 39–40).

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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OCTOBER 1944.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of

the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

(7 U. S. C., Sec. 644.)

SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed

as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(2) *Period before and after the tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of commodities.*—Where, as, for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall

be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross sales value of articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment

was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the

processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount

of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the even of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others.
(7 U. S. C., Sec. 649.)

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